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LLC

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 ROOTS READY MADE GARMENTS CO.
13 W.L.L.,

14 Plaintiff,

15 v.

16 THE GAP, INC., a/k/a, GAP, INC., GAP
INTERNATIONAL SALES, INC., BANANA
17 REPUBLIC, LLC, AND OLD NAVY, LLC

18 Defendants.

Case No. C 07-03363 CRB

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR AN ORDER
UPHOLDING CONFIDENTIALITY
DESIGNATIONS UNDER THE
PROTECTIVE ORDER**

Date: February 15, 2008
Time: 10:00 a.m.
Dept: Courtroom 8, 19th Floor
Judge: Honorable Charles R. Breyer

Roots' attempt to uphold the confidentiality designation of a May 14, 2002 agreement and a May 13, 2003 letter of understanding between Roots and Gabana is in direct contradiction to Judge Elizabeth Laporte's holding in the related case *Gabana v. Gap*, Case No. C 06 2584 CRB (EDL), that "[s]tale information shall not be designated confidential." See Declaration of Rose Darling in Support of Gap's Opposition to Roots' Motion for an Order Upholding Their Confidentiality Designations Under the Protective Order, filed herewith, Ex. A at ¶ 3 (July 5, 2007 Order). As Judge Laporte explained, information "might have been confidential if it was current information about pricing, but if it is, for example, 10 years old, it's probably no longer entitled to protection." *Id.* Ex. B at 4:7-11 (transcript of June 26, 2007 hearing). Accordingly, under Judge Laporte's ruling, stale information reflected in agreements executed between Roots and Gabana in 2002 and 2003 is not entitled to protection.

Roots argues that the 2002 and 2003 agreements should remain confidential because they "contain the terms of Roots' most recent distribution agreements, their terms remain material, and disclosure would therefore adversely affect Roots' position in ongoing negotiations of distribution agreements for other brands." Mem. at 3:22-4:3. Roots makes the same arguments that Gap made—and Judge Laporte rejected—when Gap sought to preserve its own confidentiality designations in the *Gabana* litigation in response to Gabana's blanket challenge to every single confidentiality designation in Gap's document production. There, Gap argued—as does Roots in its motion—that certain documents created in 2002 and 2003 should remain confidential because they reflect the terms of Gap's agreements with third parties, which disclosure could hamper Gap's ability to negotiate agreements with other entities. Compare Roots Mem. at 3:2-16 with Darling Decl. Ex. C (Gap's Motion for an Order Upholding Their Confidentiality Designations, filed May 7, 2007) at 6:24-25, 7:11-21. As explained above, however, Judge Laporte declined to enter an order upholding Gap's confidentiality designation as to documents dated in 2002 or 2003 on the grounds that the information contained in the documents was "stale." See *id.* Ex. A at ¶ 3; Ex. B at 4:7-11. Roots should be held to the same standard.

The information in the agreements that Roots seeks to protect—for example, terms

1 relating to pricing, product selection and quantity, and distributor's territory—is nearly six years
 2 old. The distribution agreements reveal nothing about Roots' alleged current distribution
 3 business, and Roots has not carried its burden of proving that disclosure would cause it
 4 competitive injury. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130
 5 (2003). The Court, therefore, should deny Roots' motion. *See id.*; Darling Decl. Ex. A at ¶ 3.

6 Moreover, as Judge Laporte noted, courts “have a duty to police over designation of
 7 things as confidential, especially insofar as they become part of court filings.” *Id.* Ex. B at 2:20-
 8 22; *see also Foltz*, 331 F.3d at 1134-35. In addition, “[t]he more things that are confidential . . .
 9 the more trouble it is filing documents in the Court.” Darling Decl. Ex. B at 10:11-14. Gap
 10 already has been forced to file the 2002 and 2003 agreements, as well as several pleadings that
 11 refer to the those agreements, under seal. And if the Court does not dismiss Roots' Second
 12 Amended Complaint in its entirety, Gap will likely have to file further pleadings under seal if the
 13 Court upholds Roots' designations as to these particular agreements. Any purported interest that
 14 Roots claims in maintaining the confidentiality of this outdated information is outweighed by the
 15 public's interest in having access to court filings and the interest of Gap and this Court in
 16 avoiding the inconvenience of repeatedly processing filings under seal.

17 Accordingly, Roots' motion to uphold the confidentiality of the May 2002 and May 2003
 18 agreements should be denied.

19 Dated: January 25, 2008

Respectfully submitted,
 KEKER & VAN NEST, LLP

21
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